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No. 02-1318

In the Supreme Court of the United States

ZAPATA HERMANOS SUCESORES, S.A.,

Petitioner,

v.

HEARTHSIDE BAKING CO. d/b/a MAURICE LENELL COOKY CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL ASSOCIATION OF CONTRACT AND COMMERCIAL MANAGERS AND THE INSTITUTE OF INTERNATIONAL COMMERCIAL LAW OF THE PACE UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

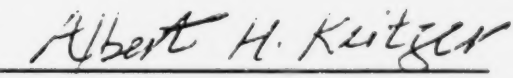
The International Association of Contract and Contract and Commercial Managers ("IACCM") and the Institute of International Commercial Law of the Pace University School of Law respectfully move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file a brief *amicus curiae* in support of petitioner. The consent of counsel for petitioner has been granted; the consent of counsel for respondent has been sought but not obtained.

Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co. d/b/a Maurice Lenell Cooky Co. is a proceeding that centers around a uniform law on international trade. The Zapata rulings of the District Court and Circuit Court of Appeals have elicited diverse views by persons from many parts of the world.

IACCM, a not-for-profit corporation, is an association of professional businesspersons engaged in international trade who represent more than 400 corporations in over 80 countries. The Pace Institute is a university learning center devoted to international trade and the uniform international sales law that is the subject of the *Zapata* proceeding. Educators, practicing attorneys and jurists associated with the Institute have written over 400 books, monographs and law journal articles on this law.

IACCM and the Institute believe that an opportunity to consider their views can be of help to the Court in its determination whether or not to grant certiorari.

Respectfully submitted,



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REASONS WHY THE COURT SHOULD RULE ON THE *ZAPATA* CASE

I. The *Zapata* case calls for interpretation of the world's most important uniform international sales law. It is the uniform law of countries that account for over two-thirds of all world trade.

II. The uniform international sales law of the United States and sixty-one sister signatories (most of the U.S.'s major trading partners) requires autonomous interpretation, within its four corners: (1) text of the law, drawing as appropriate from its (2) travaux préparatoires (legislative history), (3) doctrine (scholarly writings), and (4) jurisprudence (case law).

The Seventh Circuit Court of Appeals has resorted to domestic law to interpret uniform international sales law. Similar error that the Supreme Court can correct is present in decisions of other U.S. Circuit Courts of Appeal and District Courts.

III. Uniform law requires regard for foreign and domestic precedents as uniform law precedents. U.S. courts operate within the framework of a domestic *jurisconsultorium* for the Uniform Commercial Code; so too are courts of sister signatories expected to operate within the framework of a global *jurisconsultorium* for uniform international sales law.

The Seventh Circuit has failed to do so. Similar error that the Supreme Court can correct is present in decisions of other U.S. Circuit Courts of Appeal and District Courts.

IV. Supreme Courts of sister signatories have been heavily involved in reviews of uniform international sales law proceedings. They have handed down eighty-five rulings on this law. A United States Supreme Court ruling on the *Zapata* case will benefit the U.S. and world trade community. It can serve as a template for rulings on all uniform international sales law proceedings by all courts.

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INTERESTS OF THE AMICI CURIAE[1]

The International Association of Contract and Contract and Commercial Managers represents practicing professionals from more than 400 international corporations in over 80 countries—through its electronic library, its global web-based training programs, its international professional certification, its global conferences and provision of news and information to more than 8,000 professional negotiators, contract managers and in-house counsel. The Officers and Members of the Board of the Association (listed at <http://www.iaccm.com>) represent firms that are impacted on a daily basis by the uncertainties and risks of international law. The Association petitions because it is of clear advantage that business should have an internationally available standard as an alternative to the current national codes and that this standard has been recognized and adjudicated at the highest levels; to this end, there is today no court of greater significance than the United States Supreme Court. The Institute of International Commercial Law of the Pace University School of Law shares knowledge on uniform international sales law <http:// cisgw3. law. pace. edu>. Officers, Fellows and Members of the Board of the Institute have written 477 books, monographs and law journal commentaries on the uniform international sales law. The Institute petitions the Supreme Court in support of added certainty in uniform international commercial law.

EXECUTIVE SUMMARY

The United Nations Convention on Contracts for the International Sale of Goods (CISG) is a treaty. The United States Constitution provides for the supremacy of treaties. The States

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[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. Counsel for the Petitioner has provided written consent, a copy of which has been filed with the clerk. Counsel for Respondent has withheld consent.

Party to this Convention have covenanted with one another that "[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade." Article 7(1) CISG. In disregard of this, the Seventh Circuit has preempted the CISG (and the supremacy clause of the U.S. Constitution) in favor of domestic "procedural" law, and turned to the UCC to interpret the CISG. In so doing, that court has followed a pattern laid down by other U.S. courts that have ignored relevant non-U.S. case law and erroneously looked to U.S. domestic UCC case law to interpret the uniform international sales law. The Seventh Circuit and other U.S. courts that have so ruled turn the precepts of Article 7(1) CISG upside down. They are in conflict with courts of sister signatories to the uniform law.

The *Zapata* case offers the Supreme Court a unique opportunity to correct U.S. judicial errors and rule on a proceeding of national and international significance in a manner that puts the U.S. judiciary in the forefront of guidance to the bar and bench and the business community:

- On the proper interpretation of uniform international sales law: autonomously, within its four corners; and
- On attention to relevant case law: comity to foreign decisions much the same as U.S. courts give comity to interpretations of the UCC in sister states. Drawing on the positive experience of the U.S. judiciary with uniform-law case law under the UCC, the U.S. Supreme Court is well postured to lead the global *jurisconsultorium* on the CISG.

PRESENTATION

I. INTRODUCTION

A. The world has a uniform international sales law (CISG) that holds much promise.

"Questions often arise as to whether our law or foreign law governs the transaction, and our traders and their counsel find it difficult to evaluate and answer claims based on one or another of the many unfamiliar foreign legal systems. The Convention's uniform rules offer effective answers to these problems.

"Enhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade. I recommend that the Senate of the United States promptly give its advice and consent to the ratification of this Convention."

President Ronald Reagan in Letter to the Senate.[2]

"We believe that the Convention represents an important step forward in establishing fair, predictable, and universal principles to govern international sales transactions."

Mark R. Joelson on behalf of the ABA.[3]

B. The promise of the Convention has not been achieved in the U.S.

U.S. businesses support the Uniform Commercial Code because it reduces costs, improves efficiency and makes their country more of a common market. In a similar vein, businesses have recorded their support for the CISG because it

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[2] United States Senate, 98th Congress, 1st Session, Treaty Doc. No. 98-1.

[3] United States Senate Treaty Document 98-9, April 4, 1984, S. Hrg. 98-837 at 26.

can reduce costs, improve efficiency and make the world an increasingly unified market.[4]

U.S. courts have not been as supportive. Members of the U.S. Bar have misunderstood the CISG,[5] as have a number of U.S. courts.[6] Courts and traders have benefited from rulings on the CISG by Supreme Courts of many countries.[7] The world trade community has not yet had the opportunity to benefit from guidance on the uniform international sales law by the

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[4] "[M]any of the most important business associations have gone on record" as supporting the Convention, including "corporation counsel of some of the largest and most important corporations in the United States." The Convention "has the support of the National Foreign Trade Council . . . . The American Arbitration Association has indicated that the Convention would facilitate the settlement of disputes because of the removal of evidentiary problems and proof of foreign law. The U.S. Council for International Business has supported the Convention. The International Trade Policy Committee of the National Association of Manufacturers has supported U.S. ratification of the Convention. There are others. . . . " U.S. Senate Treaty document, *supra* note 2 at 15.

[5] See William S. Dodge, *Teaching the CISG in Contracts*, 50 J. Legal Educ. 72-94 (2000).

[6] Rulings of U.S. District courts of the Southern District of New York, the Northern District of Illinois, the Northern District of California, and of U.S. Courts of Appeal for the Second and Fourth **Circuits contain errors similar to those present in the ruling of the Seventh Circuit Court of Appeals in the *Zapata* case.** The District Court cases are *Helen Kaminski, Calzaturificio Claudia, Mitchell Aircraft Spares*, and *Supermicro Computer*; the Circuit Court cases are *Delchi Carrier* and *Schmitz-Werke*. See *infra* notes 15-20. There have, however, also been well reasoned U.S. rulings on the CISG. *MCC-Marble* and *Asante* prominent examples. *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova*, 144 F3d 1384, and *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp.2d 1142.

[7] Recognizing the importance of the CISG, **Supreme Courts of other countries have frequently corrected errors on the part of their lower courts.** They have ruled on the CISG more than eighty-five times. See <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

U.S. Supreme Court. The *Zapata* case presents an excellent opportunity for such guidance.

II. THE *ZAPATA* CASE

The Seventh Circuit has ruled contrary to the United States Constitution, failed to respect the interpretive mandate of the uniform international sales law (Article 7 CISG), and disregarded established practice U.S. Supreme Court practice (consideration of relevant case law).

A. The United States Constitution

"This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2.

The CISG is a Treaty. Judges are bound by its provisions, any Thing in other Laws to the Contrary notwithstanding. The *Zapata* case turns on whether attorneys' fees are damages. The CISG sets forth its rules on damages, Article 74. Contrary to the U.S. Constitution, the Seventh Circuit has called upon other U.S. law to preempt these rules.

B. The interpretive mandate of the uniform law

When interpreting a law, one looks to *its* terms, not the terms of some other law. When considering damages under the CISG, the Seventh Circuit instead characterizes damages in terms of another law, referring to "incidental" damages, a UCC term that is not encountered in the CISG.

CISG Article 7(1) states: *"In the interpretation of this Convention, regard is to be had to its international character*

and to the need to promote uniformity in its application and the observance of good faith in international trade." This is a mandate to interpret the CISG autonomously, within its four corners:[8] (1) Text of the law; (2) Travaux préparatoires: legislative history; (3) Doctrine: scholarly writings; (4) jurisprudence: case law.

C. The four corners of the uniform law

(1) The text of the law. Article 74 CISG contains the Convention's general rule on damages: *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract in the light of the facts and matters of which he then knew our ought to have known as a possible consequence of the breach of contract."*

The CISG aspect of the *Zapata* case turns on whether this provision of the uniform law regards attorneys' fees as damages. For Article 74 to be so regarded, one must determine whether retention of counsel is foreseeable as a consequence of the breach of contract where a buyer does not honor a payment obligation and whether attorneys' fees are "a loss suffered . . . as a consequence of the breach." The parties

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[8] For general comments on the four-corners mandate, see Bruno Zeller, *The Development of Uniform Laws—A Historical Perspective*, 14 Pace Int'l L. Rev. 163-167 (2002), and *Four Corners—The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods*, <http://cigw3.law.pace.edu/cisg/biblio/4corners.html>. For an illustrative application to another CISG remedy, see Erika Sondahl, *Understanding the Remedy of Price Reduction: A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods*, (2003), <http://cisgw3.law.pace.edu/cisg/biblio/sondahl.html>.

to the *Zapata* case stipulated that [buyer] foresaw or should have foreseen that if [buyer] failed to pay for the tins that it ordered, received and accepted, [seller] would incur litigation costs including attorneys' fees to seek payment of the invoices for said tins."[9]

(2) Legislative history. The CISG has a rich and voluminous legislative history, including material presented in ten volumes of UNCITRAL Yearbooks and in Records of the Diplomatic Conference at which this Convention was promulgated.[10]

(3) Doctrine and (4) jurisprudence. There is much scholarly writing on this law. The Institute of International Commercial Law provides an Internet bibliography that cites over 5,000 such writings on the CISG.[11] Tribunals of many countries have ruled on the CISG. There are over 1,000 such cases,[12] including over 300 judicial and arbitral rulings having to do with damages under CISG Article 74.[13]

D. Case law and doctrine

The U.S. Supreme Court has stated that "the opinions of our sister signatories [to an international convention] are to be

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[9] *Zapata Hermanos v. Hearthside Baking Co*, 2001 WL 1000927 (N.D. Ill.).

[10] This material may be accessed by drawing upon the Internet site of the Institute <http://cisgw3.law.pace.edu>.

[11] See <http://cisgw3.law.pace.edu/cisg/biblio/full-biblio.html>.

[12] See <http://cisgw3.law.pace.edu/cisg/text/anno-art-74.html>.

[13] See <http://cisgw3.law.pace.edu/cisg/text/casecit.html>.

entitled to considerable weight."[14]

This is not the approach taken by the Seventh Circuit, nor has this approach been followed by other U.S. courts which have instead stated in error—in [1995] [1997] [1998] [2001] [2002]—that: "There is virtually no case law under the Convention" *Delchi*, a Second Circuit ruling on damages under the CISG; "There is little to no case law on the CISG" *Kaminski*, Southern District, New York; "The case law interpreting and applying the Convention is sparse" *Calzaturificio Claudia*, Southern District, New York; "There is virtually no case law under the Convention" *Mitchell Aircraft*, Northern District. Illinois; "The case law interpreting and applying the CISG is sparse" *Supermicro Computer*, Northern District, California; "Case law interpreting the CISG is rather sparse" *Schmitz-Werke*, Fourth Circuit.[15]

U.S. Circuit and District Courts have also stated that it is appropriate to draw on U.S. domestic law to interpret the CISG.[16] The Seventh Circuit *Zapata* court similarly cites no CISG case law and draws instead on U.S. domestic UCC case

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[14] *Air France v. Saks*, 470 U.S. 392, 404 (1985)..

[15] *Delchi v. Rotorex*, 71 F.3d 1024 (2nd Cir. 1995); *Helen Kaminski v. Marketing Australian Products*, 1997 U.S. Dist. Lexis 10603 (S.D. NY); *Calzaturificio Claudia v. Olivieri Footwear*, 1998 U.S. Dist. Lexis 4586 (S.D. NY); *Mitchell Aircraft Spares v. European Aircraft Service*, 25 F.Supp.2d 915 (N.D. Ill.); *Supermicro Computer v. Digitechnic*, 2001 U.S. Dist. Lexis 7620 (N.D. Cal.); *Schmitz-Werke GmbH v. Rockland Industries*, 2002 WL 1357095 (4th Cir.).

[16] See Delchi, *supra* note 15 ("Caselaw interpreting analogous provisions of Article 2 of the Uniform Commercial Code ('UCC') may . . . inform a court where the language of the relevant CISG provision tracks that of the UCC . . ."); Calzaturificio Claudia, *supra* note 15 ("Caselaw interpreting Article 2 of the Uniform Commercial Code ('UCC') may be used to interpret the CISG where the provisions in each statute contain similar language . . ."); Schmitz-Werke, *supra* note 15 ("Case law interpreting provisions of Article 2 of the Uniform Commercial Code that are similar to provisions in the CISG can . . . be helpful in interpreting the Convention").

law to interpret the CISG. This conflicts with rulings by courts of sister signatories.[17]

The Seventh Circuit similarly cites U.S. doctrine—the Restatement of Contracts—but no CISG doctrine in support of its interpretation of the CISG.

III. THE TEMPLATE

The template for the *Zapata* case, for every CISG case, is: Courts should draw on interpretations of the CISG, not domestic laws and domestic restatements; The CISG should be interpreted autonomously, by looking to its four corners.

Attorneys' fees is the CISG issue. Most countries follow a "loser pays" doctrine; the U.S. generally does not. The petitioner in the *Zapata* case sought from the losing party compensation for attorneys' fees incurred. The District Court granted this relief in accordance with Article 74 CISG and for other reasons.[18] The Seventh Circuit Court of Appeals reversed the District Court.

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[17] Courts of sister signatories state that provisions of domestic law "are as a matter of principle inapplicable for the interpretation of the CISG." *Bundesgerichtshof* [Federal Supreme Court of Germany], 3 April 1996, available at <http://cisgw3.law.pace. edu/ cases/ 960403g1.html>. "The CISG requires uniform interpretation on the grounds of its multilaterality, whereby special regard is to be had to its international character (Art. 7(1) CISG. It is therefore to be interpreted autonomously, not from the perspective of the national law of the forum." Switzerland, *Richteramt* [District Court] Laufen, Canton Berne, 7 May 1993, available at <http://cisgw3.law.pace.edu/cases/930507s1.html>. The need to take into account the CISG's international character obliges one to interpret the CISG autonomously and not in the light of any domestic law. Switzerland, *Handelsgericht* [Commercial Court] Aargau, 19 December 1997, available at <http://cisgw3.law.pace. edu/cases/971219s1.html>.

[18] Zapata, *supra* note 9, and *Zapata Hermanos v. Hearthside Baking*, 313 F.3d 385 (2002).

The *Zapata* case is of high interest. Commentaries have been written on it from the United States, Denmark, Finland, Germany and Australia.[19] Others are in process.

(1) Text and issues. *"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."* CISG Article 74, sentence one. This text must be assessed in the light of its legislative history, doctrine and case law. The issues are:

- Does "loss, including loss of profit, suffered . . . as a consequence of the breach" mean "full compensation"? If so:
- Does "full compensation" include recovery of foreseeable attorneys' fees when set at a reasonable rate? If so:

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[19] SUPPORTIVE OF DISTRICT COURT OPINION. Peter Schlechtriem, *Attorneys' Fees as Part of Recoverable Damages*, 14 Pace Int'l L. Rev. 203 (2002) and Praxis des Internationalen Privat- und Verfahrensrechts (May 2002); John Felemegas, *The Award of Counsel Fees Under Article 74 CISG in Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 6 Vindobona J. Int'l Com. L. & Arb. 30-39 (2002). OPPOSED TO DISTRICT COURT OPINION. Harry M. Flechtner, *Recovering Attorneys' Fees as Damages under the U.N. Sales Convention: A Case Study on the New International Commercial Practice and the Role of Case Law in CISG Jurisprudence, with Comments on Zapata Hermanos Sucessores, S.A. v. Hearthside Baking Co.*, 22 Nw. J. Int'l L. & Bus. 121-159 (2002); Joseph Lookofsky, *Zapata Hermanos v. Hearthside Baking*, 6 Vindobona J. Int'l Com. L. & Arb. 27 (2002). CRITICAL OF DISTRICT COURT AND CIRCUIT COURT OPINIONS. Jarno Vanto, *Attorneys' Fees as Damages*, (2003), available at <http://cisgw3.law.pace.edu/cisg/biblio/ vanto1.html>. OPPOSED TO CIRCUIT COURT OPINION. John Felemegas, *An Interpretation of Article 74 CISG by the U.S. Circuit Court of Appeals*, (December 2002), available at <http://cisgw3.law.pace.edu/cisg/biblio/ felemegas1.html>. SUPPORTIVE OF CIRCUIT COURT OPINION. Harry M. Flechtner & Joseph Lookofsky, *Viva Zapata! American Procedure and CISG Substance in a U.S. Circuit Court of Appeal*, 7 Vindobona J. Int'l L. & Arb. 93-104 (2003).

- Does domestic procedural law or another theory of law preclude or preempt such an application of the CISG to attorneys' fees? If so:
- Is the basis for preclusion or preemption the CISG or is there another basis for such preclusion or preemption?

*(2) **Legislative history.*** The CISG template should refer to the legislative history of the uniform law to the extent relevant to the issues addressed. The Seventh Circuit opinion does not refer to the CISG's legislative history. The fount of Article 74 CISG is Article 82 ULIS, an antecedent uniform international sales law. The CISG legislators selected this language and set it into the CISG with no substantive change whatsoever.[20] It came accompanied with ULIS jurisprudence and doctrine holding that attorneys' fees are encompassed by its provisions;[21] and a Secretariat Commentary supporting damages as

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[20] A roadmap to the legislative history of CISG Article 74 is provided at <http://cisgw3.law.pace.edu/cisg/text/roadmap/intro-74.html>.

[21] Audit states that "[t]he international character of the Convention should encourage courts to refer to the Convention's legislative history and prior instruments (i.e., the ULIS . . .) in order to ascertain the most likely intent underlying the wording of a given provision." Bernard Audit, *The Vienna Sales Convention and* the Lex *Mercatoria*, in Thomas E. Carboneau ed., LEX MERCATORIA AND ARBITRATION, Juris Publishing, rev. ed., (1998). Citing century old precedent to the effect that where a term is used in one statute, a subsequent statute that incorporates the same term in a similar context must be construed so that the term is interpreted according to the meaning that has been previously assigned to it, Mann states: "It is simply common sense that if the Convention adopts a phrase which appears to have been taken from [an international convention] where it is used in a specified sense, the international legislators are likely to have had that sense in mind and to intend it introduction into the Convention." F.A. Mann, *Uniform Statutes in English Law*, 99 L.Q. Rev. 376 at 383 (1983). ULIS Article 82 doctrine and jurisprudence on attorneys' fees as damages are

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full compensation.[22]

(3) Doctrine (scholarly writings). The template should also refer to doctrine on the CISG to the extent relevant. Citing no CISG doctrine, the Seventh Circuit states that "there are no principles that can be drawn for determining whether 'loss' [as this term is used in CISG Article 74] includes attorneys' fees."[23] Commentators disagree. The leading commentary on the CISG states: "**Basic principle 1. Damages as full compensation.**[24]" Honnold (United States), Audit (France), Knapp (Czechoslovakia), Illescas Ortiz & Perales Viscasillas and Panteleón Prieto (Spain), Karollus (Austria), Newmayer & Ming and Schönle (Switzerland), Saidov (Uzbekistan),

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accordingly referred to below along with CISG doctrine and jurisprudence on this subject. See citations to Stoll and Herber & Czerwenka, *infra* notes 24 and 27.

[22] UN A/CONF/97/5, Doc. C(3) at 58-80. Commissioned by the UN General Assembly to guide the CISG's legislators, the Secretariat Commentary is the closest available counterpart to an official commentary on the Convention.

[23] Zapata, *supra* note 18.

[24] Hans Stoll, *Damages*, in Peter Schlechtriem ed., COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), Clarendon: Oxford, 553 (1998). This guide to the CISG, along with its German edition, KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT, Beck 3rd ed. (2000) is cited most frequently by courts of sister signatories to the CISG. This commentary states: "The Convention provides for damages for loss, including loss of profit, suffered as a consequence of breach of contract (Article 74, first sentence), but does not define in more detail which are the losses for which compensation can be obtained. In order to identify the losses for which compensation may be demanded, regard must be had to the principle of full compensation. . . ." *Id.* at 558. Full compensation means that the aggrieved party is entitled to compensation for all consequences of the breach (Stoll, *op. cit.*, Kommentar at 697), albeit limited by foreseeability and mitigation requirements. Felemegas, *supra* note 19.

Enderlein & Maskow and Piltz (Germany) also so state.[25]

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[25] John O. Honnold, UNIFORM LAW FOR INTERNATIONAL SALES, Kluwer, 3rd ed. (1999) 445 ("Damages consist of 'the loss, including loss of profit suffered . . . as a consequence of the breach' . . . a standard that is designed to place the aggrieved party in as good a position as if the other party had properly performed the contract"); Bernard Audit, LA VENTE INTERNATIONALE DE MARCHANDISES, Librarie Générale de Droit et de Jurisprudence (1990) ("La Convention consacre le principe de la reparation intégrale [the principle of full compensation] du dommage prévisible"); Viktor Knapp, *Damages in general*, in C.M. Bianca & M.J. Bonell eds, COMMENTARY ON THE INTERNATIONAL LAW, Giuffrè (1987) 543 ("Article 74 is based on the principle of full compensation"); Rafael Illescas Ortiz & Pilar Perales Viscasillas, DERECHO MERCANTIL INTERNSVCIONSL. EL DERECHO UNIFORME, Madrid (2003) 224; Fernando Pantaleón Prieto, in Luis Diez-Picazo y Ponce de Leon, LA COMPRAVENTA INTERNACIONAL DE MERCADERIAS (1998) 591 ("Principio de conpensación plena [the principle of full compensation] o resarcimiento o reparación integral"); Martin Karollus, UN-KAUFRECHT. EINE SYSTEMATISCHE DARSTELLUNG FÜR STUDIUM UND PRAXIS, Springer (1991) ("Grundsatz der Totalreparation Prinzip [general principle of full compensation] des vollen Schadenasugleichs"); Karl H. Neumayer & Catherine Ming, COMMENTAIRE DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES, CEDIDAC (1993) ("La Convention part du principe de la reparation intègrale [the principle of full compensation]: le debiteur est tenu de rembourser la totalité du préjudice prévisible qu'il a causé, ce qui inclut tous de désavantages qu'il a occcasionnés à son concontractant . . . ."); Herbert Schönle, in Heinrich Honsell ed, KOMMENTAR ZUM UN-KAUFRECHT, Springer (1997) 943 ("Geschuldet wird grundsätzlich Totalreparation [principle of full compensation] . . . Der Richter kann dem Geschädigten nicht lediglich teilweisen Ersatz des verursachten Schadens zusprechen"); Djakhongir Saidov, *Methods of Limiting Damages under the Vienna Convention on Contracts for the International Sale of Goods*, (2003), <http://cisgw3.law.pace.edu/cisg/biblio/saidov.html> ("[C]ompensation for 'loss, including loss of profit, suffered as a consequence of the breach' . . . covers any situation which causes any type or form of loss . . . the principle of full compensation . . . should be the basis for determining the loss"); Fritz Enderlein & Dietrich Maskow, INTERNATIONAL SALES LAW, Oceana, 298-299 (1992); Burghard Piltz, INTERNATIONALES KAUFRECHT.

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Illescas & Perales state that legal costs as well as the costs of a specialist are within the concept of loss. Schlechtriem concurs, as does Felemegas.[26] Herber & Czerwenka state: *"The costs of legal consequences, in specific the cost of attorneys' fees and court fees, are to be compensated [under Article 74]. The procedural costs are regularly ruled upon in the applicable procedural rules. If it is the case that the procedural rules settle the compensation issue in its entirety, these cost-shifting procedural rules are of the essence also in determining the issue of liability for damages. If . . . the procedural rules do not determine the compensation of legal costs for the prevailing party or determine them only in part, these can be claimed as damages under the CISG."* [27]

(4) Case law

The Seventh Circuit states that "it seems apparent that 'loss' [as the term is used in CISG Article 74] does not include attorneys' fees incurred in the litigation of a suit for breach of contract, though certain pre-litigation legal expenses for

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DAS UN-KAUFRECHT, Beck (1993) 289 "Art. 74 Satz 1 sicht daher vor, dass der infolge der Vertragsverletzung zu ersetzen ist, und zielt auf den vollen Ausgleich aller der anderen Vertragspartei zugefügten Nachteile (Grundsatz der Totalreparation) [principle of full compensation)".

[26] Illescas & Perales, *supra* note 33 ("los costes legales, asi como, en su case, los gastos por utilización de un especialista, tanbién entran en el concepto de daños y perjuicios"). See also Schlechtriem, *supra* note 19; see also Felemegas, *supra* note 19.

[27] Rolf Herber & Beate Czerwenka, INTERNATIONALES KAUFRECHT, KOMMENTAR ZU DEM ÜBEREINKOMMEN DER VEREINTEN NATIONEN VOM 11. APRIL 1980 ÜBER DEN INTERNATIONALEN WARENKAUF, Beck (1991). They cite the ruling on ULIS Article 82 in *Landricht* [District Court] of Essen, available at <http://cisgw3.law.pace.edu/ cases/800610g1. html>.

example, expenditures designed to mitigate the plaintiff's damages would probably be covered as 'incidental' damages."[28] The court does not explain how it parses CISG Article 74 to read the UCC term "incidental" damages into the CISG. The court cites UCC case law as authority for this interpretation of the CISG, but no CISG case law. This conflicts with approaches taken by courts of sister signatories. Where relevant CISG case law is available, it has been cited; where considerable CISG case law is available, courts of sister signatories have cited considerable CISG case law.[29]

There are many CISG cases are on point. Citing Honnold, the *U.S. Second Circuit Court of Appeals* states that "CISG art. 74 . . . is 'designed to place the aggrieved party in as good a position as if the other party had properly performed the contract'." The *Appellate Court of Hamburg* states that the damages payable based on a breach of contract under Article 74 are not limited to lost profit but extend to total loss caused by the non-performance. The *Supreme Court of Austria* states that liability for damages means that the party relying on the contract should be put in the same financial position he had been in, had the contract been duly performed in accordance with the principle of full compensation. An *ICC Arbitration panel* states that Article 74 gives a right to the aggrieved party to obtain compensation for any predictable damages arising out of the fundamental non-performance of a contracting party. The *Court of Konstanz* awarded the seller damages for costs incurred by employing a collection agency. The court held that these expenses belonged to the costs to be compensated "which

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[28] Zapata, *supra* note 18.

[29] See, for example, *Tribunale* [District Court] Vigevano 12 July 2000 (forty relevant CISG cases cited) and *Tribunale* Rimini 26 November 2002 (thirty-seven relevant CISG cases cited), available at <http://cisgw3.law.pace.edu/cases/000712i3.html> and <http://cisgw3.law.pace.edu/cases/011126i3.html>.

the [buyer] ought to have foreseen as a possible consequence of the breach at the time of the conclusion of the contract. Drawing on the literal meaning of the damages provision in the uniform international sales law, the *Court of Essen* allowed compensation for attorneys' fees as damages, stating: "The court does not follow the [buyer]'s opinion that the German national principle regarding collection fees should be applied. Under this principle, the compensable amount for employing a collection agency is limited by the official attorney fee for a request for payment. These judge-made German rules cannot automatically be applied to a determination of damages under [the uniform international sales law], both for reasons of private and international and material law." The *Viechtach Court* granted the plaintiff attorneys' fees under Article 74. According to this court, the term "loss" in Article 74 encompasses the cost of pursuing one's rights. A *Belgian Court* granted the plaintiff collection costs resulting from protesting a check that did not clear. According to that court, such costs fall under Article 74. Costs relating to collection of outstanding payments were awarded as damages by a *Swiss Court*. The court stated that the costs resulting from hiring an attorney for collection purposes were recoverable under Article 74 insofar as breach of contract gave sufficient rise for such expenses. A *Dutch Court* awarded the plaintiff collection costs, stating that Article 74 did not exclude such costs. The *Aachen Court* awarded the plaintiff collection costs, stating that such costs have to be reimbursed under Article 74. The *Austrian Supreme Court* confirmed the principle of full compensation in Article 74, stating that due to a party's breach of his contractual obligation, the aggrieved party is entitled to full compensation for its losses. The *Court of Düsseldorf* did not award the plaintiff damages for attorneys' fees even though the court stated that Article 74 of the CISG encompasses compensation for the cost of a reasonable pursuit of one's legal rights. The court stated that it was against good

faith to claim attorneys' fees both as damages and as a part of the cost of proceedings which, according to the loser-pays rule, are borne by the defendant. The *Berlin Court* awarded the plaintiff attorneys' fees as damages, stating that under Article 74 the aggrieved party is entitled to damages for consequential loss resulting from the contractual breach. The court brings forth that the function of Article 74 is to remedy the aggrieved party so as to put him in the same financial position he would have been in if the contract had been duly performed by the party in breach. An *ICC Arbitration proceeding* awarded the plaintiff damages for preservation costs of undelivered goods, attorneys' fees and arbitration expenses and loss of profit. The Tribunal stated that such losses are foreseeable in the meaning of Article 74 and usual in cases of avoidance of a contract for breach of one party. The *Frankfurt Court* stated that Article 74 covers the expenses for appropriate legal actions taken and in particular costs of collection proceedings if the purchase price was due at the time of request for payment.[30]

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[30] The cases are respectively: United States, *Delchi v. Rotorex*, 71 F.3d 1024 (2nd Cir. 1995); Germany, *Oberlandesgericht* Hamburg 26 November 1999 <http://cisgw3.law. pace.edu/cases/991126g1.html>; Austria, *Oberster Gerichthof* 14 January 2002, <http://cisgw3.law.pace.edu/ cases/020114a3. html>; *ICC* Arbitration Case No. 8716 of February 1997, <http://cisgw3 .law.pace.edu/cases/97871611.html>; Germany, *Landgericht* Konstanz 3 June 1983, <http://cisgw3.law.pace.edu/cases/830603g1.html>; Germany, *Landgericht* Essen, 10 June 1980, <http://;cisgw3.law.pace.edu/ cases/ 800610g1.html>; Germany, *Amtsgericht* Viechtach 11 April 2002, <http://cisgw3.law.pace.edu/cases/ 020411g1.html>; Belgium, *Rechtbank van Koophandel* 4 April 2001, <http://cisgw3.law.pace.edu/cases/010404b1. html>; Switzerland, *Handelsgericht* Aargau 19 December 1997, <http://cisgw3.law.pace.edu/cases/971219s1. html>; Netherlands, *Gerechtshof* s' Hertogenbosch 2 October 1997, <http://cisgtw3.law.pace. edu/cases/971002n1. html>; Germany, *Landgericht* Aachen 20 July 1995, <http://cisgw3.law.pace.edu/cases/950720g1.html>; Austria, *Oberster*

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These courts are in accord with the legislative history and doctrine on CISG Article 74. Insofar as domestic labels should not play a role in a CISG-governed dispute, the holdings of these courts support the conclusion that attorneys' fees may be claimed as damages under CISG Article 74.

IV. Assessment of issues

Considering the text of Article 74 and taking into account its legislative history, doctrine and case law, "loss" including loss of profit suffered as a consequence of a breach of contract means full compensation; the plain meaning of *full* is "entire", "containing as much as possible", "lacking restraint or limitation". If one looks to the plain meaning of *full*, full compensation includes recovery of attorneys' fees when, as in the *Zapata* case, they are foreseeable and (in accordance with Article 77) reasonable. One must also ask:

- Does domestic procedural law or another theory of law preclude or preempt the application of Article 74 to foreseeable attorneys' fees. If so: Is the basis for this the CISG?

The U.S. Constitution states that treaties are the supreme law of the land. If full compensation under the CISG includes attorneys' fees and the CISG is supreme, it would seem that no source other than the CISG can preempt or preclude its application—other than a later-in-time source. In the absence

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Gerichthof 6 February 1996, <http://cisgw3.law.pace.edu/cases/ 960206a3.html>; Germany, *Oberlandesgericht* Düsseldorf 14 January 1994, <http://cisgw3.law.pace.edu/cases/940114g1.html>; Germany, *Landgericht* Berlin 30 September 1992, <http://cisgw3.law.pace.edu/cases/920930g1.html>; *ICC* Arbitration Case No. 7585 of 1992, <http://cisgw3.law.pace.edu/ cases/927585i1.html>; and Germany, *Landgericht* Frankfurt 16 September 1991, <http://cisgw3.law.pace.edu/ cases/910916g1.html>.

of such, the basis for any preemption or preclusion of the absence of this treaty to attorneys' fees would therefore have to be the CISG. If within the CISG, there is adequate autonomous support for such preemption or preclusion, the Court should so hold. If not, the Court should not so hold.

- Or is there an alternative basis for such a preclusion or preemption?

An alternative is to set aside the CISG and resolve the issue by turning to domestic law, e.g., domestic procedural law. The Seventh Circuit took this approach. It raises another issue that merits Supreme Court review: labels, substantive law vs. procedural law; whether a domestic label should control a CISG proceeding.[31]

CONCLUSION

We urge the Court to look upon this case as an opportunity:

- To correct errors and provide guidance on autonomous interpretation of the CISG, within its four corners; and
- Drawing on U.S. judicial experience with uniform-law case law, to encourage all courts to consider case law of sister signatories when ruling on uniform international sales law.[32]

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[31] For views of leading commentators (the leading U.S. commentator and a leading Singapore commentator) that domestic labels should not control CISG proceedings, see John O. Honnold, *supra* note 25 at 74-76, and Warren L.H. Khoo, in C.M. Bianca & M.J. Bonell eds., COMMENTARY ON THE INTERNATIONAL LAW, Guiffré, 48 and 50 (1987). See also C. Giovannucci Orlando, *Procedural Law Issues and Uniform Law Conventions*, Uniform Law Review 23-41 (2000-2001).

[32] Article 7(1) of the CISG, properly understood "requires . . . an approach not unlike the treatment U.S. courts accord decisions of other jurisdictions when applying our Uniform Commercial Code." Harry M. Flechtner,

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Courts of all countries can benefit from U.S. judicial experience with uniform-law case law.

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(...continued)

Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and Other Challenges to the Uniformity Principle in Article 7(1), 17 J.L. & Com. 187-217 (1998). "[W]hen interpreting the Convention, a court should look to other court's interpretations of the Convention, including the interpretations of courts from other countries. . . . The use in the U.S. of case law to interpret the Uniform Commercial Code (UCC) can serve as a model for courts using case law to interpret the Convention. No state within the U.S. is bound by an interpretation of the UCC from another state, but the interpretations of the UCC from other jurisdictions are extremely persuasive. While this method does not achieve exact uniformity, the U.S. has achieved a level of uniformity in sales law that is useful to companies transacting business in many states." Philip T. Hackney, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 Louisiana L. Rev. 479 (2001).